Supreme Court of the United States

OCTOBER TERM, 1969

No. 1178

UNITED STATES,

Petitioner

—v.—

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO

Civil Action No. 1529

IN THE MATTER OF THE ADJUDICATION OF PRIORITY RIGHTS TO THE USE OF WATER FOR IRRIGATION AND OTHER BENEFICIAL PURPOSES IN WATER DISTRICT NO. 37 IN THE STATE OF COLORADO,

THE COLORADO RIVER WATER CONSERVATION DISTRICT, PETITIONER

RELEVANT DOCKET ENTRIES

1967	
October 2	Petition for Supplemental Adjudication of Water Rights
October 13	Certified List, Claimants of Water Rights, State Engineer
October 20	Notice of Application for Supplemental Adjudication of Water Rights
1968	
March 22	Motion to Dismiss the United States for Lack of Jurisdiction

THE SUPREME COURT OF THE STATE OF COLORADO

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO AND THE JUDGE THEREOF, THE HONORABLE HAROLD A. GRANT, RESPONDENTS

THE COLORADO RIVER WATER CONSERVATION DISTRICT, CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, CENTRAL COLORADO WATER CONSERVANCY DISTRICT, AND THE NEW JERSEY ZINC COMPANY, INTERVENORS

RELEVANT DOCKET ENTRIES

ORIGINAL PROCEEDING

1968	
October 17	Application of the United States for Writ in the Nature of Prohibition filed
October 31	Rule to Show Cause issued
November 29	Answer to Rule to Show Cause
1969	
September 15	Opinion
October 1	Order discharging Rule to Show Cause

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO

Civil Action No. 1529

IN THE MATTER OF THE ADJUDICATION OF PRIORITY RIGHTS TO THE USE OF WATER FOR IRRIGATION AND OTHER BENEFICIAL PURPOSES IN WATER DISTRICT NO. 37 IN THE STATE OF COLORADO,

THE COLORADO RIVER WATER CONSERVATION DISTRICT, PETITIONER

NOTICE OF APPLICATION FOR SUPPLEMENTAL ADJUDICATION OF WATER RIGHTS

THE PEOPLE OF THE STATE OF COLORADO TO:

All persons, associations and corporations interested in the priority of rights to the use of water for beneficial purposes in Water District No. 37.

YOU ARE HEREBY NOTIFIED That the above named Petitioner has filed a petition, entitled as above, in which it prays for the supplemental adjudication of all water rights for beneficial purposes in Water District No. 37.

YOU ARE FURTHER NOTIFIED That said court did, by an Order entered herein, designate and appoint Friday, the 22nd day of December, 1967, at the hour of 10:00 o'clock A.M., at the District Courtroom in the Courthouse at Eagle, in Eagle County, Colorado, as the time and place for the beginning of the taking of evidence in said adjudication. Said evidence shall be taken by and before the Court.

All owners and claimants of any water rights in said District are hereby notified to file a statement of claim and to appear at said time and place so appointed and designated for the taking of evidence, in regard to all water rights owned or claimed by them. All water users within said District are further notified to be present at the time and place appointed for the beginning of the taking of evidence as above set forth, in case they wish to resist a claim which may be made for any water right

in said suit or proceeding, except that this notice shall not require any owner or claimant of a water right which has already been adjudicated to submit such water right in this supplemental adjudication.

YOU ARE FURTHER NOTIFIED that in said petition, filed as aforesaid, the petitioner asked for an adjudication of the following amounts of water as set opposite each of its claims herein, to-wit:

(a) The Wolcott Reservoir—65,975 acre feet of water, including 810 acre feet of dead storage;
(b) Wolcott Pumping Pipeline—500 cubic feet of water per second of time;

all dating back to April 27, 1966 for municipal, industrial, domestic, irrigation, stock watering, electric power generation, recreational and other beneficial uses and purposes.

(c) Nolan Creek Feeder Canal—38.5 cubic feet of water per second of time.
(d) Hat Creek Feeder Canal—27.0 cubic feet of water per second of time,

all dating back to June 10, 1966 for irrigation, domestic, municipal, industrial and other beneficial uses and purposes;

All persons interested may, at the time and place appointed as aforesaid for commencing to hear and take evidence in said adjudication or at the time and place to which said hearing may be continued, present proof for or against the priority rights by appropriation claimed by the petitioner herein, and for or against any priority right by appropriation sought to be shown by any other party, by, through, or under any ditch, canal, reservoir, or other structure.

WITNESS my hand and the seal of said Court this 3rd day of October, 1967.

/s/ Anna L. Robidoux
ANNA L. ROBIDOUX
Clerk
District Court of
Eagle County, Colorado

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO

Civil Action No. 1529

IN THE MATTER OF THE ADJUDICATION OF PRIORITY RIGHTS TO THE USE OF WATER FOR IRRIGATION AND OTHER BENEFICIAL PURPOSES IN WATER DISTRICT NO. 37 IN THE STATE OF COLORADO,

THE COLORADO RIVER WATER CONSERVATION DISTRICT, PETITIONER

MOTION TO DISMISS THE UNITED STATES FOR LACK OF JURISDICTION

The United States moves this Court to dismiss the United States from the above-captioned action for lack of jurisdiction for the reasons set forth in the accompanying Memorandum of Points and Authorities.

/s/ Lawrence M. Henry
LAWRENCE M. HENRY
United States Attorney
Denver, Colorado

/s/ Warwick Downing II
WARWICK DOWNING II
Assistant United States Attorney
Denver, Colorado

/s/ James W. Moorman
JAMES W. MOORMAN
Attorney, Department of Justice
Washington, D. C.

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO

Civil Action No. 1529

IN THE MATTER OF THE ADJUDICATION OF PRIORITY RIGHTS TO THE USE OF WATER FOR IRRIGATION AND OTHER BENEFICIAL PURPOSES IN WATER DISTRICT NO. 37 IN THE STATE OF COLORADO,

THE COLORADO RIVER WATER CONSERVATION DISTRICT, PETITIONER

MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF MOTION TO DISMISS THE UNITED STATES FOR LACK OF JURISDICTION

* * * *

V FORMER ADJUDICATIONS & RIGHTS OF THE UNITED STATES IN WATER DISTRICT NO. 37

The United States claims water rights in Water District 37 which have never been the subject of an adjudication proceeding. These rights are under the administration of the Department of Agriculture. These rights claimed by the United States are rights with a date of reservation earlier than priorities granted in previous adjudications in Water District No. 37. To be specific:

The United States will claim those rights to use the waters within Colorado Water District 37 (primarily the Eagle River and its tributaries) by reason of the withdrawal of public lands within Water District 37 and the reservation thereof as National Forest lands. Said withdrawal was made by Presidential Proclamation of August 25, 1905 (34 Stat. 3144), and the United States claims those waters that it may now or in the future require for the purpose of said withdrawal with a priority of August 25, 1905.

In addition to our general reserved right, the United States will claim various specific uses, as follows:

(a) 39 specific uses upon the above said withdrawn lands for which the United States has made filings with

the State Engineer. The dates of these filings run from 5/18/1939 to 3/1/1965. The United States will, however, claim the date of reservation, 8/25/1905.

(b) 185 specific uses upon the above said withdrawn lands for which the United States has made no filing with the State Engineer. Of the uses, 68 are current uses and 117 are foreseeable uses. The United States will claim the date of reservation, 8/25/1905.

(c) 10 C.F.S. for the Minturn Ranger Station Ditch, diverted from the Eagle River at a point on the right bank of the river whence the northwest corner of the SW¼ of Sec. 36, T. 5 S., R. 81 W., 6th P.M. bears S 87° 25′W, a distance of 1982 feet. The date of appropriation is September 16, 1941. The water is used for irrigation, watering, and fire protection.

(d) 1 C.F.S. for Nelson Ditch diverted from the Eagle River at a point on the south bank of the river, whence the northwest corner of the SW¼ of Sec. 36, T. 5 S., R. 81 W., 6th P.M. bears S 75° 31′W, a distance of 1337.1 feet. The date of appropriation is May 28, 1902. The water is used for irrigation and stock watering.

(e) Additional specific uses may be claimed. For example, at the moment the Department of Agriculture is investigating the general reserved right and six specific uses on an area acquired from the Department of Defense and known as Camp Hale. The reservation and priority dates have not been determined at this time.

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF EAGLE
AND STATE OF COLORADO

Civil Action No. 1529

IN THE MATTER OF THE ADJUDICATION OF PRIORITY RIGHTS TO THE USE OF WATER FOR IRRIGATION AND OTHER BENEFICIAL PURPOSES IN WATER DISTRICT NO. 37 IN THE STATE OF COLORADO,

THE COLORADO RIVER WATER CONSERVATION DISTRICT, PETITIONER

SUPPLEMENT TO MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS THE UNITED STATES FOR LACK OF JURISDICTION

On pages 12 and 13 of our Memorandum of Points and Authorities, we state in summary the rights the United States claims in Water District 37 for the purpose of indicating their nature and the dates claimed. On page 13 it is stated that "Additional specific uses may be claimed." It is the purpose of this supplement to indicate briefly the nature and date of certain additional rights claimed by the United States, but which were only reported to the Department of Justice in the past two weeks.

(1) On page 13, we noted 228 uses which the United States would claim under a National Forest reservation date of August 25, 1905. Based on more accurate information, however, the United States claims 375 such uses. Current uses amount to .449 c.f.s. and 59.8 acre feet. Foreseeable uses amount to 954 c.f.s. and 420.7 acre feet.

(2) The United States also claims 14 uses on certain acquired lands within the White River National Forest. The dates for these uses have not yet been determined.

(3) The United States claims 19 rights to use springs and waterholes on lands managed by the Bureau of Land Management. In regard to these springs the United States claims a reservation date of April 17, 1926, based on an Executive Order issued that date entitled Public

Water Reserve No. 107. In addition to the April 17, 1926, reservation date, the United States claims it has priority to use these springs under § 148-2-2, Colo. Rev. Stat. (1963). In the alternative, the United States will claim priorities at least as early as the early 1940's for most of the springs.

(4) The United States claims rights for approximately 75 additional uses on lands managed by the Bureau of Land Management for livestock, wildlife and recreation. These uses fall into two principal categories: (a) small reservoirs or retention dams; and (b) small diversions from both perennial and intermittent streams. The United States claims priorities in the 1940's, 1950's and 1960's for the reservoirs and retention dams. Information concerning the priorities for the diversions has not yet been supplied to the Department of Justice. In addition, the United States may claim a reservation date for some of these rights.

/s/ Lawrence M. Henry
LAWRENCE M. HENRY
United States Attorney
Denver, Colorado

/s/ Warwick Downing II
WARWICK DOWNING II
Assistant United States Attorney

/s/ James W. Moorman
JAMES W. MOORMAN
Attorney, Department of Justice
Washington, D. C.

August 7, 1968

No. ———

IN THE SUPREME COURT
OF THE STATE OF COLORADO

THE UNITED STATES OF AMERICA

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO AND THE JUDGE THEREOF, THE HONORABLE WILLIAM H. LUBY

APPLICATION FOR WRIT IN THE NATURE OF PROHIBITION

COMES NOW the United States of America by United States Attorney, Lawrence M. Henry, Assistant Attorney General, Clyde O. Martz, Chief, Appellate Section, Roger P. Marquis, Assistant United States Attorney, Warwick Downing, II, and Attorney, Department of Justice, James W. Moorman, and PRAYS that an alternative Writ in the Nature of Prohibition issue out of this Court to the District Court in and for the County of Eagle and State of Colorado and to the Judge thereof, the Honorable William H. Luby, prohibiting said court and Judge from asserting jurisdiction over the United States, from adjudicating any water rights of the United States or from purporting to bind the United States in Civil Action No. 1529, captioned IN THE MATTER OF THE ADJUDICATION OF PRIORITY RIGHTS TO THE USE OF WATER FOR BENEFICIAL PURPOSES IN WATER DISTRICT NO. 37 IN THE STATE OF COLORADO (a supplemental adjudication in Water District No. 37 under section 148-9-7, Colo.Rev.Stat. (1963)), for the reason that said court and Judge are wholly without jurisdiction over the United States. The grounds for this application and the circumstances out of which it arose are as follows:

(1) On November 2, 1967, the Attorney General of the United States received by registered mail a copy of NOTICE OF APPLICATION FOR SUPPLEMENTAL ADJUDICATION OF WATER RIGHTS for Civil No. 1529, a copy of which is attached hereto as Appendix A;

(2) The service of said notice was purportedly for the purpose of fulfiling [sic] the service requirements of 43 U.S.C. Sec. 666 (66 Stat. 560, known as the McCarren [sic] Amendment) whereby the United States has consented to being joined to certain general water adjudications.

(3) For the reasons summarized in this paragraph, and more fully set forth in the Memorandum of Points and Authorities submitted herewith, neither Civil No. 1529 nor any supplemental adjudication under Colorado law is a proceeding to which the United States has consented to be sued under 43 U.S.C. Sec. 666 or any other statute and therefore said court and Judge cannot lawfully attempt to assert jurisdiction over the United States:

(i) The United States cannot be subjected to the jurisdiction of any court without the consent of Congress;

(ii) The only statute passed by Congress consenting to water adjudications is 43 U.S.C. Sec. 666;

(iii) 43 U.S.C. Sec. 666 only consents to a general adjudication of a river system in which all rights of all water users are before the court;

(iv) The only rights a Colorado District Court can hear and adjudicate in a supplemental adjudication are rights acquired by appropriation within the water district since the last prior adjudication; the court cannot hear or determine rights determined in that or earlier prior adjudications;

(v) The court had no jurisdiction to adjudicate rights other than those arising under Colorado law, but the United States claims rights otherwise arising;

(vi) Water District 37 does not embrace an entire river system;

(vii) The last prior decree in a water adjudication in Water District No. 37 was entered on February 21, 1966, in proceedings to which the United States was not a party; and

(viii) Because of the reasons set forth in (iv)-(vii), neither Civil No. 1529, nor any supplemental adjudication under § 148-9-7, Colo.Rev.Stat. (1963), is the kind of general adjudication to which the United States has consented under 43 U.S.C. Sec. 666.

(4) The United States has not voluntarily subjected itself, as a plaintiff or petitioner, to any water adjudication in Water District No. 37.

(5) The said court and Judge have been informed by the United States and are aware that the United States owns various water rights within Water District No. 37, (see Appendix B), that said rights are entitled to priority dates which are prior to many rights adjudicated in supplemental adjudications in Water District No. 37 and that said rights have never been adjudicated.

(6) The assertion of jurisdiction over the United States by said court and Judge in Civil No. 1529 purports (a) to bind the United States to prior adjudications even though the United States was not a party to said proceedings and did not have its day in court and (b) to cut off and destroy the rights of the United States by subordinating the priorities of the United States to all other priorities in the Water District.

(7) On March , 1968, the United States filed with said court a Motion to Dismiss the United States from Civil No. 1529 and a Memorandum of Points and Authorities in support thereof detailing all the matters set forth in 3-6 above. A copy of said motion and brief together with a supplement thereto filed August 7, 1968, is attached hereto as Appendix B.

(8) On August 7, 1968, the motion of the United States was heard in open court in Eagle, Colorado, and all the matters set forth in 3-6 above were brought to the attention of said court.

(9) At said hearing on August 7, the City and County of Denver acting by, through and on behalf of its Board of Water Commissioners by its attorney, Glenn G. Saunders, argued that said court was indeed without jurisdiction over the United States and moved said court to order a Supplemental Notice to all water users to convert Civil 1529 into a general adjudication, all for the purpose of purportedly curing the jurisdictional defects raised by the United States. A copy of Denver's Motion for Supplemental Notice and Brief on Jurisdiction over the United States is attached hereto as Appendix C.

(10) On August 20, 1968, the Motion of Denver for Supplemental Notice was heard in open court. At said

hearing the United States again brought to said court's attention the matters set forth in 3-6 above. At this hearing all attorneys of other parties speaking to the subject more or less agreed to the need of a supplemental notice, thus admitting a deficiency in said court's jurisdiction. The United States opposed the supplemental notice on the ground that it would not have the effect under Colorado law intended by Denver in that it would not cure deficiencies in the supplemental adjudication which place it outside 43 U.S.C. Sec. 666. The United States filed at that time an Opposition to Motion for Supplemental Notice, a copy of which is attached as Appendix D. The United States also explains in detail in the Memorandum of Points and Authorities filed herewith why it opposes the supplemental notice and believes it would be of no effect.

(11) At said hearing on August 20, said Judge ruled from the bench that the motion of the United States to dismiss be denied and the motion of Denver for supplemental notice be denied. Said Judge has set October 21, 1968, as the last date for filing statements of claim and October 28 as the date for taking evidence in said matter.

(12) The question of jurisdiction of the United States in 1529 is one of great importance. The United States is the owner of many water rights in the State of Colorado. By and large these rights have not been adjudicated under Colorado adjudication procedures (148-9-1, et seq., C.R.S. (1963)). The United States, however, has recently been served in three additional supplemental adjudications:

(1) W.D. 36, Dist. Ct., Summit Co., Civil No. 2371;
(2) W.D. 51, Dist. Ct., Grand Co., Civil No. 1768; and
(3) W.D. 52, Dist. Ct., Eagle Co., Civil No. 1548.

The United States has filed motions to be dismissed from each of these adjudications, which motions are still pending. In addition, the United States has been informally advised by members of the Bar of Colorado that it may expect to be served in many more supplemental adjudications throughout Colorado. Thus it is clear that many

citizens of the State of Colorado are attempting to bind the United States to proceedings to which it was not a party and to cut off and destroy the rights of the United States by the means of having the courts of Colorado assert purported jurisdiction over the United States in supplemental adjudications. This creates the need for a clear opinion from this tribunal upholding the immunity of the United States from suit.

It should be pointed out, of course, that if this Court were to find that this Application and its supporting brief misstate Colorado law and were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date of its reserved and appropriative rights, most of the objections of the United States to these adjudications would be removed. While the United States could not, even then, be joined as a defendant under 43 U.S.C. sec. 666, for the reason that an entire river system would not be involved, the United States would be assured it could have its rights properly adjudicated if it chose to appear as plaintiff in a Colorado Water District adjudication. While no representation can be made at this time as to what the United States would do in any particular case, it can be represented that the Department of Justice would raise no general objection to appearances as plaintiff in appropriate cases under the supposed circumstances.

WHEREFORE, the Petitioner, the United States of America prays this Honorable Court:

1. To take original jurisdiction in the matters thus presented to it;

2. To issue an order commanding the respondent court and Judge to show cause why they, and each of them, should not be prohibited from asserting or attempting to assert jurisdiction over the United States in Civil No. 1529;

3. To issue an order prohibiting the respondents, said court and Judge, from asserting or attempting to assert jurisdiction over the United States in Civil No. 1529.

LAWRENCE M. HENRY
United States Attorney

/s/ Clyde O. Martz
CLYDE O. MARTZ
Assistant Attorney General

/s/ Roger P. Marquis
ROGER P. MARQUIS
Chief, Appellate Section

WARWICK DOWNING, II
Assistant United States Attorney

/s/ James W. Moorman
JAMES W. MOORMAN
Attorney
Department of Justice
Washington, D. C.

October 14, 1968

EXHIBIT A

IN THE SUPREME COURT
OF THE STATE OF COLORADO

23819

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO AND THE JUDGE THEREOF, THE HONORABLE WILLIAM H. LUBY, RESPONDENTS

RULE TO SHOW CAUSE

THE PEOPLE OF THE STATE OF COLORADO TO THE DISTRICT COURT OF EAGLE COUNTY AND THE HONORABLE WILLIAM H. LUBY, A JUDGE THEREOF,

GREETING:

You are hereby ordered and directed to appear in the Supreme Court of the State of Colorado within thirty days from service hereof and answer in writing and show cause, if any you may or can have, why the relief requested in the petition herein should not be granted.

You are further ordered to stay all further proceedings in the within cause of action until further order of Court.

Let a true copy of this rule, together with a copy of the petition herein be served upon you and each of you.

WITNESS, the Honorable O. OTTO MOORE, Chief Justice of our Supreme Court, and the seal of said Court, in the City of Denver, this thirty-first day of October, A.D. 1968.

RICHARD D. TURELLI
Clerk of the Supreme Court
of the State of Colorado

By /s/ Evelyn F. Oliver
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 23819

THE UNITED STATES OF AMERICA
v.
THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO AND THE JUDGE THEREOF, THE HONORABLE WILLIAM H. LUBY, RESPONDENTS
THE COLORADO RIVER WATER CONSERVATION DISTRICT, INTERVENOR

ANSWER

The respondents herein, the District Court in and for the County of Eagle and State of Colorado, and the Honorable William H. Luby, the Judge thereof, by their attorneys, and in compliance with the Rule to Show Cause entered herein respectfully submit the following answer:

The Court below and the Judge thereof had before it at the time of ruling on the Motion of the United States to Dismiss as to it and the Motion of the City and County of Denver for Supplemental Notice, the statutes of the State of Colorado and briefs prepared by the attorneys of the various parties appearing before the Court, as well as oral argument by such counsel.

The Court and the Judge thereof considered itself bound by prior rulings of Federal Courts on the identical question presented by the Motion of the United States to Dismiss as to it, relying principally upon *In re Green River Drainage Area*, 147 Fed. Supp. 127 and *Four Counties Water Users Association* v. *The Colorado River Water Conservation District* and the *United States of America*, Civil Action No. 8880 in the United States District Court for the District of Colorado.

The Court and the Judge thereof further deemed the Notice given to be in compliance with statute and therefor sufficient.

The Court and the Judge thereof respectfully request this Court to consider the brief of the Intervenor, The Colorado River Water Conservation District as its brief in support of this answer.

Respectfully presented,

DELANEY & BALCOMB

By /s/ Kenneth Balcomb
KENNETH BALCOMB
Attorneys for the
Respondents,
P.O. Drawer 790
Glenwood Springs, Colorado
945-6546

No. 23819

THE UNITED STATES OF AMERICA, PETITIONER

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO AND THE JUDGE THEREOF, THE HONORABLE HAROLD A. GRANT, RESPONDENTS

THE COLORADO RIVER WATER CONSERVATION DISTRICT, CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, CENTRAL COLORADO WATER CONSERVANCY DISTRICT, AND THE NEW JERSEY ZINC COMPANY, INTERVENORS

ORIGINAL PROCEEDING

EN BANC RULE DISCHARGED

Clyde O. Martz, Assistant Attorney General
Shiro Kashiwa, Assistant Attorney General
Lawrence M. Henry, United States Attorney
James L. Treece, United States Attorney
Warwick Downing II, Assistant United States Attorney
Roger P. Marquis, Attorney, Department of Justice
James W. Moorman, Attorney, Department of Justice
David Osborne, Attorney, Department of Justice

Attorneys for Petitioner,

Delaney and Balcomb,
Kenneth Balcomb,
Respondent, District Court and Judge thereof, and the Intervenor, The Colorado River Water Conservation District

George L. Zoellner,
Glenn G. Saunders,
Intervenor, City and County of Denver, acting by and through its Board of Water Commissioners

Miller and Ruyle,
David J. Miller,
Robert A. Ruyle,
Alvin L. Steinmark,
Intervenor, Central Colorado Water Conservancy District

Dawson, Nagel, Sherman & Howard,
Don H. Sherwood,
Raphael J. Moses,
Intervenor, New Jersey Zinc Company

Attorneys for Respondents

MR. JUSTICE GROVES delivered the opinion of the Court

This is an original proceeding in this court wherein the United States has asked for a writ prohibiting the district court from asserting jurisdiction over it in a supplemental water adjudication under C.R.S. 1963, 148-9-7. We issued a rule to show cause why the relief requested should not be granted.

The proceeding is in Water District 37 of the State of Colorado, which embraces the Eagle River and its tributaries. The Eagle River is a tributary of the Colorado River and is non-navigable. There have been a number of previous adjudications in this water district. The decree in the original adjudication was entered eighty years ago and the last one was entered on February 21, 1966. The United States was not a party in any of these earlier proceedings.

The current proceedings were commenced by the Colorado River Water Conservancy District and it sought to make the United States a party under 43 U.S.C. § 666 (known as the McCarran Amendment) which reads in part as follows:

> "(a) *Joinder of United States as Defendant; Costs.* Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights,

where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

"(b) *Service of Summons.* Summons or other process in any such suit shall be served upon the Attorney General or his designated representative."

The United States moved the district court for dismissal as to it by reason of lack of jurisdiction. This motion was denied by the Honorable William H. Luby, the judge of the court, who has since retired. We have concluded that the district court has jurisdiction over the United States in these proceedings and that the motion was properly denied.

The propositions asserted by the United States are based upon the solid foundation that: (1) the United States cannot be subjected to the jurisdiction of any court without the consent of Congress; and (2) the only statute adopted by the Congress consenting that the United States may be made a party to a water adjudication is the McCarran Amendment. *Dalehite* v. *United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427; *United States* v. *Sherwood*, 312 U.S. 584, 61 S. Ct. 767, 85 L. Ed. 1058; *United States* v. *Shaw*, 309 U.S. 495, 60 S. Ct. 659, 84 L. Ed. 888; *United States* v. *Clarke*, 33 U.S. (8 Pet.) 436, 8 L. Ed. 1001. The Government's propositions are as follows:

(1) The McCarran Amendment can be used only with respect to a general adjudication of a river sys-

tem in which all rights of all users are before the court; and the present proceeding does not involve (a) a general adjudication, (b) an entire river system, nor (c) all water users in the district.

(2) The United States has unadjudicated rights antedating the last adjudicative decree and the district court cannot give priorities to these rights prior to the date of the last adjudication.

(3) The district court has jurisdiction only to adjudicate rights arising out of Colorado law and the United States claims rights arising otherwise.

The following are considered as the "appropriation" states with respect to water adjudications: Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Utah, Washington and Wyoming. With the exception of Colorado all of the appropriation states have a statewide system of adjudicating priorities or issuing permits for the use of water. Until 1969 Colorado throughout its history has been divided into water districts and adjudicated priorities have been determined within each district. In 1969 the General Assembly of Colorado adopted Senate Bill 81 amending C.R.S. 1963, 148-21-1 *et seq.* which consolidates the 70 water districts of the state into seven divisions, each of which embraces an entire river drainage area within the state. The water adjudication here involved was commenced prior to the adoption of this amendment. There may be some question (which we do not decide) as to whether any further proceedings in the district court will be under the statutes existing before or after this amendment. However, we regard this as immaterial to the jurisdictional question presented. Except as expressly stated otherwise, our comments with respect to Colorado water laws will be with respect to those in existence prior to the 1969 amendment.

As the Government points out, priorities to the use of water are established by decrees of our district courts in the several water districts. Under our statutes there can be an original adjudication culminating in a decree fixing these priorities. Thereafter there can be a supple-

mental adjudication to establish priorities to the use of water not decreed in the original proceedings. There is no limit to the number of successive supplementary proceedings that may be had. The earliest priority granted in any supplemental adjudication must be later than the last priority established by the next preceding adjudication. *Hardesty Co.* v. *Arkansas Valley Co.*, 85 Colo. 555, 277 P. 763. Those appropriating water within the water district involved who were not served personally or by mail with notice of the proceedings are barred from attacking a decree after the lapse of two years. Those outside the water district may bring an action to adjust priority rights as between different districts within four years from the time of rendition of a decree having an effect thereon. C.R.S. 1963, 148-9-16 and 17. In practically all of the districts in Colorado, prior to the adoption of the McCarran Amendment in 1952, there had been not only original adjudications but supplementary adjudications.

I

CONGRESSIONAL INTENT

We address ourselves first to the question as to whether it was the intent of Congress that the "adjudication of rights" set forth in the McCarran Amendment includes water adjudications in Colorado. As a preface to this consideration it should be mentioned at the outset—as is later a subject of this opinion—that the United States can obtain in a supplementary water adjudication in Colorado an adequate judicial determination of its rights to the use of water and of the relative priorities of those rights to other water rights.

Water in any area is a vital commodity. A great part of the agricultural lands in the appropriation states can be productive only with the use of water for irrigation. Each state has control of the use and priority of use of water, not only for irrigation, but for domestic, municipal and industrial purposes.

The trend of Congressional legislation has been to require the United States to be in the position of any other

claimant to water rights. The Desert Land Act of 1877 made all non-appropriated waters from non-navigable sources upon the public lands "free for the appropriation and use of the public for irrigation, mining and manufacturing purposes." 43 U.S.C. § 321.

> "The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. . . . If it be conceded that in the absence of federal legislation the state would be powerless to affect the riparian rights of the United States or its grantees, still, the authority of Congress to vest such power in the state, and that it has done so by the legislation to which we have referred, cannot be doubted." *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356.

A part of the Reclamation Act in effect since 1902 reads:

> "Vested rights and State laws unaffected: Nothing [in this chapter] shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions [of this chapter], shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof." 43 U.S.C. § 383.

The McCarran Amendment was adopted during the second session of the 82nd Congress in 1952. Its language was taken from S. 18, which was introduced in the first session of that Congress in 1951. On April 25, 1951 a member of the Denver Bar testified at a committee hear-

ing as to the nature of water adjudications in Colorado (pages 27 and 28 of Hearings Before A Sub-committee Of The Committee On The Judiciary, United States Senate Eighty-Second Congress, First Session, On S. 18, A Bill To Authorize Suits Against The United States To Adjudicate And Administer Water Rights). He explained how water rights of the City of Denver have been adjudicated in at least seven districts. This brought clearly to the committee's attention the characteristics of the Colorado system as distinct from those of other states.

The report of the Senate Judiciary Committee, prepared as a result of these hearings, after quoting from *Ickes* v. *Fox*, 300 U.S. 82, 57 S. Ct. 412, 81 L. Ed 525, stated:

> "It is therefore settled that in the arid Western States the law of appropriation is the law governing the right to acquire, use, administer and protect the public waters as provided in each such State.
>
> "It is most clear that where water rights have been adjudicated by a court and its final decree entered, or where such rights are in the course of adjudication by a court, the court adjudicating or having adjudicated such rights is the court possessing the jurisdiction to enter its orders and decrees with respect thereteo and thereafter to enforce the same by appropriate proceedings. In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equita-

> ble use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in suits wherein water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity." Senate Calendar No. 711, Report No. 755, September 17, 1951.

H. R. 7289 was a House appropriation bill in the second session of the 82nd Congress. After original action by the House of Representatives, the United States Senate added to it the McCarran Amendment. The bill as so amended came before the House in July 1952. Congressman Rooney of New York moved to strike the amendment and read a communication addressed to him by the Quartermaster General of the United States Marine Corps, a portion of which stated:

> "The effect of such legislation to give a blanket waiver by the United States of its immunity from suit in actions of this kind, opens the way for piecemeal adjudications of water rights in the various State courts, with the United States compelled to defend itself in a multiplicity of actions." Congressional Record—House—July 4, 1952, p. 9445.

Following Mr. Rooney's remarks his motion to strike the amendment lost with all four of Colorado's Congressmen voting "Nay."

Many river systems originate around the Continental Divide in Colorado, collect a substantial part of their flow in Colorado, provide water for the irrigation of Colorado lands and Colorado's domestic, municipal and industrial uses—as adjudicated by our district courts—and flow into Colorado's seven neighboring states. Some of these rivers are the South Platte, Arkansas, Rio

Grande, San Juan, Colorado, White and Yampa, flowing from Colorado to Wyoming, Nebraska, Kansas, Oklahoma, New Mexico, Arizona and Utah.

Our situation with respect to water rights has been that priorities are decreed under state laws, but any water rights of the United States in Colorado remain mysterious, largely unknown, uncatalogued and unrelated to decreed water rights. This creates an undesirable, impractical and chaotic situation. It was to remedy this situation and similar ones in other states that caused Congress to adopt the McCarran Amendment.

The foregoing is only a portion of the history and record which leads us to the conclusion that Congress intended to include the water adjudicative procedure of Colorado among the suits in which sovereign immunity of the United States would be waived. See *In re Greenriver Drainage Area*, 147 F. Supp. 127 and Vol. 1 of the Study of Development, Management and Use of Water Resources on the Public Lands Prepared for the Public Land Law Review Commission, pp. 189-195.

II

A GENERAL ADJUDICATION

The Government argues that the McCarran Amendment relates only to a "general adjudication" and that a supplementary adjudication is not a "general adjudication." The term "general adjudication" is not used in the statute—rather there we find "adjudication of rights." However, the attorneys for the United States point to the use of the term "general adjudication" in *Dugan* v. *Rank*, 372 U.S. 609, 83 S. Ct. 999, 10 L. Ed. 2d 15. More thorough treatment of the facts and question presented is contained in the decision of the United States Court of Appeals reviewed in *Dugan*, *sub nom State* v. *Rank*, 293 F.2d 340. This was an action brought by some, but not all, of the users of water of the San Joaquin River in California to enjoin the United States and officials of the Bureau of Reclamation from storing and diverting water of that river. In *Dugan* Mr. Justice Clark stated, "Rather than a case involving a *general* adjudication

* * *, it is a private suit to determine water rights solely between respondent and the United States and the local Reclamation Bureau officials." *State* v. *Rank, supra,* was affirmed. In it the Court of Appeals had stated:

> "The question presented by the contention of the United States requires us to determine whether this suit can be regarded as one 'for the adjudication of rights to the use of water of a river system' within the meaning of § 666.
>
> "(2) There can be little doubt as to the type of suit Congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters of a stream system; rather, it was the quasi-public proceeding which in the law of western waters is known as a 'general adjudication' of a stream system: one in which the rights of all claimants on a stream system, as between themselves, are ascertained and officially stated."

Supplementary water adjudications in Colorado throughout the history of the state have been referred to as "general adjudications." The use of the term in *Dugan,* particularly considering the above quoted language of *State* v. *Rank, supra,* does not bolster the Government's contention. In fairness, it should be stated that counsel for the United States have combined with the term "general adjudication" additional clauses to the effect "of an entire river system in which all water users are joined." We proceed to the subject of "entire river system" immediately. Later in this opinion, in connection with our discussion of the adequacy of relief to the United States under Colorado law, we will address ourselves to the matter of other parties necessary to the proceeding.

III

RIVER SYSTEM

The Government has stressed repeatedly that an "entire river system" must be involved in order for the McCarran Amendment to be invoked. It urges that District

37 does not embrace an "entire river system." The McCarran Amendment does not contain the word "entire," but rather reads, "adjudication of rights to the use of water of a river system."

An *entire* river system well could mean all of a river and its tributaries above the place of discharge into the ocean. In the case of the Colorado River it would involve water flowing and appropriated in the states of Colorado, Utah, New Mexico, Wyoming, Arizona, Nevada and California. A court of one state cannot adjudicate the rights of ditches diverting water in another state. *Irrigation Co.* v. *Garvey*, 117 Colo. 109, 184 P.2d 476. Such an interpretation as urged by the Government would confine the operation of the McCarran Amendment solely to those rivers arising and remaining entirely within the boundaries of one state. Obviously this was and is not the purpose, intent and effect of the Amendment.

It may be that here the United States wished to infer that the McCarran Amendment relates to proceedings in the other western states which have state-wide adjudications, but not to Colorado because of its segmentary water districts. The Little Snake River is in northwestern Colorado. It crosses into Wyoming and after a few miles returns to Colorado, emptying eventually (still in Colorado) into the Yampa River. Under the proposition just mentioned, Wyoming could bring the United States into adjudication of waters appropriated from the small portion of the Little Snake in that state; but Colorado could not do the same as to the much greater portion of the stream within its boundaries.

It is obvious that a state-wide adjudication can be just as fragmentary as that of a water district. At most, the differences are matters of degree. Therefore, we conclude that a proceeding under C.R.S. 1963, 148-9-7 in Water District 37—or any other water district—constitutes an adjudication of rights to the use of water of a *river system* contemplated by the McCarran Amendment. The testimony of the Denver attorney mentioned earlier supports Congressional intent in this respect.

With respect to the Government's argument that the same river may flow through more than one water dis-

trict, attention is directed to *Ft. Lyon Canal Co.* v. *Arkansas Valley S. B. & I. L. Co.*, 39 Colo. 332, 90 P. 1023. It was there said:

> "Ample provision is made for the protection of the rights of parties to proceedings in the same district, but none of the provisions relating to this class relate to appropriators in different districts, as between each other. As to these, it was necessary for the orderly distribution of water, that the decrees in the different districts should be *prima facie* binding, but in order to protect their rights, as between each other, a period was given within which actions might be instituted to settle and adjust such rights. For this purpose, §§ 2434 and 2435 [Mills' Ann. Stats.] were enacted. Thereby opportunity was afforded to adjust such rights by an independent action, but, wisely, the period within which such an action could be commenced was prescribed; otherwise, rights as between appropriators of water in different districts where rights have been adjudicated, under the statutory proceedings, would remain unsettled indefinitely."

The provisions of §§ 2434 and 2435 as mentioned are the same as C.R.S. 1963, 148-9-17. With this correlation between districts under our statutes and with the creation of a division for each river by the 1969 amendment (C.R.S. 1963, 148-21-1 *et seq.*), the same practical result can be obtained in adjudication of rights under Colorado statutes as under the state-wide systems of other states.

IV

APPROACH TO THE ADJUDICATION OF WATER RIGHTS OF THE UNITED STATES

The remainder of the propositions asserted by the Government (as outlined early in this opinion) might be characterized as follows: If the state court in Colorado has jurisdiction over the United States, how and why can it grant the relief the United States would desire with respect to its water rights? In oral argument counsel

for the Government indicated if there were a satisfactory answer to that question, the United States might not be so loathe to submit itself to the jurisdiction of our state courts. He also gave the distinct impression that he would be most surprised if we produced a ruling which would overcome the trepidation of the Justice Department to see federal water rights under the state jurisdiction. Whether or not we mitigate the sovereign reluctance, we hold that under its plenary power a Colorado district court can make the relative rights of the United States a subject of its decree and can bring under its jurisdiction additional necessary parties in order to make such a decree fully valid, effective and enforceable. Before elaborating on this declaration, we deem it advisable to discuss some of the features and problems involved—or perhaps to be involved—in any decretory approach to the water rights of the United States in Colorado, which must be confronted someday whether in our state courts or in a federal forum.

In the district court the United States filed a memorandum supporting its motion to dismiss. It there made the following statement concerning its claims to the use of water:

> "The United States claims water rights in Water District 37 which have never been the subject of an adjudication proceeding. These rights are under the administration of the Department of Agriculture. These rights claimed by the United States are rights with a date of reservation earlier than priorities granted in previous adjudications in Water District No. 37. To be specific:
>
> "The United States will claim those rights to use the waters within Colorado Water District 37 (primarily the Eagle River and its tributaries) by reason of the withdrawal of public lands within Water District 37 and the reservation thereof as National Forest lands. Said withdrawal was made by Presidential Proclamation of August 25, 1905 (34 Stat. 3144), and the United States claims those waters that it may now or in the future require for the pur-

pose of said withdrawal with a priority of August 25, 1905.

"In addition to our general reserved right, the United States will claim various specific uses, as follows:

"(a) 39 specific uses upon the above said withdrawn lands for which the United States has made filings with the State Engineer. The dates of these filings run from 5/18/1939 to 3/1/1965. The United States will, however, claim the date of reservation, 8/25/1905.

"(b) 185 specific uses upon the above said withdrawn lands for which the United States has made no filing with the State Engineer. Of the uses, 68 are current uses and 117 are forseeable uses. The United States will claim the date of reservation, 8/25/1905.

"(c) 10 C.F.S. for the Minturn Ranger Station Ditch, diverted from the Eagle River at a point on the right bank of the river whence the northwest corner of the SW ¼ of Sec. 36, T. 5 S., R. 81 W., 6th P.M. bears S 87° 25'W, a distance of 1982 feet. The date of appropriation is September 16, 1941. The water is used for irrigation, watering, and fire protection.

"(d) 1 C.F.S. for Nelson Ditch diverted from the Eagle River at a point on the south bank of the river, whence the northwest corner of the SW ¼ of Sec. 36, T. 5 S., R. 81 W., 6th P.M. bears S 75° 31'W, a distance of 1337.1 feet. The date of appropriation is May 28, 1902. The water is used for irrigation and stock watering.

"(e) Additional specific uses may be claimed. For example, at the moment the Department of Agriculture is investigating the general reserved right and six specific uses on an area acquired from the Department of Defense and known as Camp Hale. The reservation and priority dates have not been determined at this time."

In its application here, the United States makes the statement, "The court had no jurisdiction to adjudicate

rights other than those arising under Colorado law, but the United States claims rights otherwise arising." We are not sure whether by this statement the United States asserts that none of its rights have arisen under Colorado law. For the purpose of our discussion we will assume that it claims both (a) water rights reserved in connection with the withdrawal of public lands and which it asserts have not arisen under Colorado law and (b) appropriations arising under Colorado law (such as possibly may be the case as to water diverted by the Nelson Ditch mentioned in its memorandum).

V

RESERVED RIGHTS

The Government insists that our district courts have jurisdiction only to adjudicate rights under the doctrine of appropriation and, therefore, they do not have jurisdiction over the so-called reserved water of the United States. It advises us that such reserved rights are valid with priorities substantially antedating several of the supplementary decrees in Water District 37 under the authority of *Arizona* v. *California*, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542; *Federal Power Commission* v. *Oregon*, 349 U.S. 435, 75 S. Ct. 832, 99 L. Ed. 1215; *Winters* v. *United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340; *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 19 S. Ct. 770, 43 L. Ed. 1136.

In contrast, counsel for the intervenor Central Colorado Water Conservancy District contend that the United States has no rights whatsoever except any that it might have acquired in the same manner as an individual. In support of this they cite Article XVI, §§ 5 and 6 of the Colorado constitution and *Stockman* v. *Leddy*, 55 Colo. 24, 129 P. 220. These sections were placed in the constitution at the time it was prepared under the enabling act of Congress. Section 5 and a portion of Section 6 read as follows:

> "Section 5. Water of streams public property.—The water of every natural stream, not heretofore

appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

"Section 6. Diverting unappropriated water—priority preferred uses.—The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. * * *"

In *Stockman* this court stated:

"This constitution of ours was ratified and adopted by the legal voters of the state in accordance with the conditions prescribed by the enabling act of congress, and the president of the United States in his proclamation admitting Colorado into the Union found the fact to be that the fundamental conditions imposed by congress on the State of Colorado to entitle it to such admission had been complied with. Congress, in passing the enabling act, and the President, in issuing his proclamation, were aware of the existing physical conditions and of the topography and geography of the state. The federal government, by its lawmaking and executive bodies, knew that the natural streams of this state are, in fact, nonnavigable within its territorial limits, and practically all of them have their sources within its own boundaries, and that no stream of any importance whose source is without those boundaries, flows into or through this state. The entire volume of these streams is therefore made up of rains and snows that fall upon the surface of lands included within the exterior lines of this state and of springs which issue from the earth within the same area. Such being the peculiar conditions, the state was justified in asserting its ownership of all the natural streams within its boundaries. When Colorado was admitted into the Union with such a constitution, the federal government, through its lawmaking and executive departments, thereby recognized and confirmed such right of ownership as belonging to the state in its

sovereign capacity. We therefore find it to be not only that our state constitution and pertinent statutes, but the decisions of the courts and duly announced public policy, all are in accord on the proposition to which the federal government has, as we have just shown, given its consent that the waters of the natural streams of this state belong to the people, to the state, in its sovereign capacity, and that its right to their distribution and control within its borders is free from any interference by any other sovereignty."

The authorities cited by the United States are not directly in point so far as its rights in Colorado are concerned. *Arizona* v. *California*, *supra*, involves claims of the United States on behalf of Indian reservations and other withdrawn lands, most if not all of which were created or withdrawn prior to the time Arizona was admitted into the Union in 1912. Furthermore, Arizona has never had a provision in its constitution declaring proprietorship of water as does the Colorado constitution. In *Arizona* v. *California* it was said:

"Arizona's contention that the Federal Government had no power, after Arizona became a State, to reserve waters for the use and benefit of federally reserved lands rests largely upon statements in Pollard's Lessee v. Hagan, 3 How. 212, 11 L.Ed. 565 (1845), and Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894). Those cases and others that followed them gave rise to the doctrine that lands underlying navigable waters within territory acquired by the Government are held in trust for future States and that title to such lands is automatically vested in the States upon admission to the Union. But those cases involved only the shores of and lands beneath navigable waters. They do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution. We have no

> doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property."

Certainly this is not authority to refute the contention that, by reason of the provisions of Colorado's constitution as originally adopted, the United States surrendered its right in the future to reserve water.

In *Federal Power Commission* v. *Oregon*, *supra*, the Commission had issued to a power company a license to construct a hydro-electric plant, including a dam across a navigable stream. The dam was to be located in part upon an Indian reservation and the remainder upon lands long before withdrawn for power purposes. The project did not involve any permanent diversion of water as the entire flow of the river would run through or over the dam into the natural bed of the stream. It was held that the Federal Power Act was applicable to the license and a license from the state was not necessary. Again, this case is not direct authority for the answer sought here in Colorado.

Winters v. *United States*, *supra*, involved water for an Indian reservation reserved prior to the admission of Montana into the Union. It was argued that the subsequent admission of Montana into the Union "upon an equal footing with the original States" (25 Stat. 676) repealed the reservation of water. This argument was not accepted. We are not concerned here with water rights asserted by the United States prior to Colorado's admission into the Union.

The *United States* v. *Rio Grande Dam & Irrig. Co.*, *supra*, involved acts within the Territory of New Mexico prior to the time New Mexico became a state. It was there stated:

> "Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the con-

> tinued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States."

Here, instead, we are dealing with a non-navigable stream and instead of having an "absence of specific authority from Congress," the question is what was the specific authority from the United States in its recognition of the Colorado constitution.

> "In sharp contrast, however, stand federal rights under the reservation doctrines, which are the subject of mystery, whose true nature can be unveiled only through the search of the few obscure instances wherein they have been adjudicated." The foregoing is from the study submitted to Public Land Law Review Commission, *supra*, P. S-13.

We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn. We do say at this time that, except for *Stockman* v. *Leddy*, *supra*, we have not encountered any decision determinative as to whether the United States has reserved water rights in Colorado; and we postpone the consideration of whether *Stockman* is to be overruled, as perhaps it must be if the contentions of the United States as to its reserved water rights are found to be sound.

VI

WATER APPROPRIATIONS OF THE UNITED STATES UNDER STATE LAW

As already mentioned, the United States has not been a party in any previous general adjudication in District

37. In its brief the Government cites Colorado statutes and our decisions under which decrees in water adjudications cannot be attacked after four years and in a subsequent water adjudication a priority cannot be given to a use of water prior to the date of the last adjudicated decree. It quotes from *Arizona* v. *California*, 298 U.S. 558, 56 S. Ct. 848, 80 L. Ed. 1331 that "no decree rendered in its absence can bind or affect the United States * * *." The brief continues:

> "It is self-evident that supplemental water adjudications are not actions to which the United States has consented. It would be absurd to hold that the United States is bound by prior adjudications to which it was not a party and is thus now bound by proceedings in which it cannot have its rights adjudicated. Such a holding would convert 43 U.S.C. Sec. 666 into an instrument of injustice that would destroy the rights of the United States. It is for this reason that 43 U.S.C. Sec. 666 consents only to an adjudication in which all the rights of all users are before the court."

The quoted language in *Arizona* v. *California* was not made in connection with an adjudication of water rights by a state court and here again we are going to wait until the matter is argued more fully and specifically before making a determination as to whether this applies to Colorado water adjudications. Offhand, we are inclined to believe that it does apply. In *Irrigation Co.* v. *Garvey*, 117 Colo. 109, 184 P.2d 476 there was involved water appropriated in Utah from Rock Creek, which arises in Utah, flows into Colorado, and then returns to Utah. The question was whether Utah users were bound by a Colorado adjudicative decree more than four years old. This court held that they were not and in this opinion Mr. Justice Stone wrote:

> "However, the decree can speak only as to matters within the jurisdiction of the court, and where the court in such a statutory proceeding attempts to determine matters beyond its competence, its decree, as to such matters, is not conclusive. 'If the

> court lacks jurisdiction to render, or exceeds its jurisdiction in rendering, the particular judgment in the particular case, such judgment is subject to collateral attack, even though the court had jurisdiction of the parties and of the subject matter.' *People ex rel.* v. *Burke*, 72 Colo. 486, 212 Pac. 837. So where the court by its decree attempted to adjudicate the ownership of the water, it was held that, 'In so far as this decree purports to settle and fix relative rights of individual users and consumers of water through said ditch, it is ineffectual.' *Rollins* v. *Fearnley*, 45 Colo. 319, 101 Pac. 345. And, to the extent a decree is beyond the authority of the court, it cannot be made valid by any rule of res judicata or any statutes of limitation. It is no more effectual after four years, than before."

It well may be that the same principle should be applied to appropriations made by the United States which have not been included in previous adjudications to which the United States was not a party.

VII

JURISDICTION OVER THE WATER CLAIMS OF THE UNITED STATES

We now return to the proposition asserted earlier that the United States can obtain in a supplementary water adjudication in Colorado an adequate judicial determination of its rights and relative priorities. For the purpose of our holding in this respect we make the following three assumptions *arguendo*: (1) The United States has reserved water rights in Water District 37 initiated prior to more recent general adjudication decrees in that district; (2) The United States has acquired rights to the use of water under Colorado law and such rights were initiated prior to the decrees just mentioned; and (3) The United States is entitled to a decree that its rights to the use of water are the same as if each of those rights had been awarded priorities in a water adjudication next following the initiation of the right. We repeat—these are assumptions *arguendo*—not determinations.

Water rights in Colorado are of the greatest importance to the welfare and economy of the people of this state, and of considerable importance to the United States. There are about 2,700,000 acres of land under irrigation in Colorado. Of the 66½ million acres of land in Colorado, the United States has 36.4%—or about 24⅓ million acres—in the form of public domain, national forests, national parks and monuments, military reservations and an Indian reservation.

We have a situation in which the federal sovereign claims water rights which are nowhere formally listed, which are not the subject of any decree or permit and which, therefore, are etheric in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure—and this is equally true from the standpoint of the United States as well as Colorado and its citizenry. The fact that our statutes do not provide for the adjudication of the rights of the United States with priorities prior to the dates of later decrees does not mean that our district courts in a water adjudication cannot determine the rights of the United States in relation to decreed water rights. On the contrary, our district courts have that jurisdiction. "The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate and criminal cases, except as otherwise provided herein * * *." Colo. Const. art. VI, § 9(1). We hold that the Constitution, without the need of any statute, grants jurisdiction of the subject matter under consideration.

The following remarks of Professor Karl N. Llewellyn are apt in this situation:

> "But a court must strike to make sense *as a whole* out of our law *as a whole*. It must, to use Frank's figure, take the music of any statute as written by the legislature; it must take the text of the play as written by the legislature. But there are many ways to play that music, to play that play, and a court's duty is to play it well, and in harmony with the

other music of the legal system." Llewellyn "Remarks on the Theory of Appellate Decision" etc., 3 Vanderbilt L. Rev. 395.

Moreover, there are statutes which appear to recognize this jurisdiction which we hold is plenary:

"For the purpose of hearing, adjudicating and settling all questions concerning the priority of appropriation of water between owners and claimants of water rights drawing water from the same source within the same water district, and all other questions of law and questions of right growing out of, or in any way involved or connected therewith, jurisdiction is hereby vested exclusively in the district court of the county in which said water district exists * * *." C.R.S. 1963, 148-9-2.

"It is hereby declared to be the policy of the state of Colorado that all waters originating in or flowing into this state, whether found on the surface or underground, have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with law. As incident thereto, it shall be the policy of this state to integrate the appropriation, use and administration of underground water tributary to a stream with the use of surface water, in such a way as to maximize the beneficial use of all of the waters of this state." C.R.S. 1963, 148-21-2(1) being the Water Right Determination and Administration Act of 1969.

For the reasons already expressed as to the promotion of orderly procedure, we hold that it was the purpose and intent of the McCarran Amendment that it be used to obtain jurisdiction over the United States with respect to its reserved water rights. Of particular significance was the letter of the Acting Assistant Secretary of the Interior to the Chairman of the Committee on the Judiciary as to the McCarran Amendment under date of August 3, 1951. This is made a part of the Committee's Report mentioned earlier on pages 7 and 8. Senate Calendar No. 711, *supra*. A portion of the letter reads:

> "The interests of the United States in the use of the waters of its river systems are so many and so varied that a full enumeration of them could not be made without a great deal of careful study. It is enough, I hope, for present purposes to exemplify these interests by pointing to those which it has under the commerce clauses of the Constitution; those which exist by virtue of the creation of Indian reservations under the doctrine of *United States* v. *Winters* (207 U.S. 564 (1908) or by virtue of the creation of, for instance, a national park; those which it has asserted by entering into international treaties; those which it may have by virtue of its present and prior ownership of the public domain and which have not vested under the acts of July 26, 1866 (14 Stat. 253, 43 U.S.C. 661), July 9, 1870 (16 Stat. 218, 43 U.S.C. 661), and March 3, 1877 (19 Stat. 377, 43 U.S.C. 321); those with respect to which its officers and employees have followed the procedure prescribed in section 8 of the act of June 17, 1902 (32 Stat. 388, 43 U.S.C. 383); and those which it has acquired by purchase, gift, or condemnation from private owners. Since the United States can be said, with varying degrees of accuracy, to be the 'owner' of rights of any or all these types, it is clear to me that enactment of the bill could lead to a tremendous volume of unwarranted litigation and, in the absence of a complete and detailed catalogue of all the rights and interests which the United States has in the stream systems of the Nation, to the hazard that, by overlooking some, it would be forever precluded from asserting them thereafter."

See also the discussions in 19 Stan. L. Rev. 65, *et seq.*; 20 Stan. L. Rev. 1187, *et seq.* and the Study submitted to the Public Land Law Commission, pp. 189-195, mentioned above. We are holding here that whatever rights the United States has to water can be recognized and adjudicated by our district courts just as adequately as in any other forum—and perhaps more adequately. Therefore, it would seem that no adequate reason exists to

withhold reserved rights from the light of day and adjudication.

VIII

NOTICE

In its appearance before the district court the City and County of Denver moved for an order providing for the notification of all appropriators in Water District 37 in order that the priorities of the United States' claims to water might be adjudicated. It filed a brief supporting its belief that the court can do this under the portion of C.R.S. 1963, 148-9-7 which reads, "if the proceeding be supplemental as to one class of rights, for example, irrigation, and original as to another class, for example non-irrigation, the service shall be necessary on those whose rights have already been adjudicated." The claims of the United States, says Denver, is another class of rights under that statute. The United States and most of the other parties here disagree. As we hold that the district court has jurisdiction by reason of its plenary powers, it follows that the court need not have a statutory provision for notice. After the United States has filed its statements of claim in the district court, including the priority dates it seeks, the court then can determine which claimants of adjudicated rights need be given notice and can specify the manner that notice shall be given. Obviously, notice should be directed to those who might be adversely affected if the prayers for relief of the United States were granted.

Undoubtedly it would be preferable to have a statute setting forth the manner of notice in the circumstances under consideration, and it well may be that legislation in other respects might be helpful in implementing the jurisdiction of our courts over the United States. But although desirable, legislation is not necessary to implement the adjudication of rights under this opinion nor to protect the rights of all parties who may be involved, including the United States.

IX

WATER RIGHT DETERMINATION AND ADMINISTRATION ACT OF 1969

Senate Bill 81 adopted in 1969 (C.R.S. 1963, 148-21-1 *et seq.*) was approved after the briefs were filed in this proceeding and prior to oral argument. Following oral argument the United States and the City and County of Denver filed supplemental briefs on the subject of the effect of this Act upon the questions involved, if any. Since the district court did not have this matter before it, we deem it the better part of wisdom to await its determination with respect to this matter. We do make the observation that some or all of the parties in Water District 37, as well as in similar proceedings in other parts of the state which have been held in abeyance awaiting this opinion, may conclude that the provisions of the 1969 Act are more suitable than the pre-existing statutes for adjudications involving the United States.

Rule discharged.

IN THE SUPREME COURT OF THE STATE OF COLORADO

23819

THE UNITED STATES OF AMERICA, PETITIONER

vs.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO AND THE JUDGE THEREOF, THE HONORABLE HAROLD A. GRANT, RESPONDENTS

THE COLORADO RIVER WATER CONSERVATION DISTRICT, CITY AND COUNTY OF DENVER, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, CENTRAL COLORADO WATER CONSERVANCY DISTRICT, AND THE NEW JERSEY ZINC COMPANY, INTERVENORS

ORIGINAL PROCEEDING

On consideration of the pleadings and arguments herein, it is hereby ordered that the rule to show cause heretofore issued in this action be, and it hereby is, discharged.

By the Court. September 15, 1969.

SUPREME COURT OF THE UNITED STATES

No. 1178, October Term, 1969

UNITED STATES, PETITIONER

v.

DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO ET AL.

ORDER ALLOWING CERTIORARI—Filed March 30, 1970

The petition herein for a writ of certiorari to the Supreme Court of the State of Colorado is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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